(1840) 9 C & P. (38 E. C. L.) 344. A servant who took his master's oats without permission and fed them to his master's horses was held guilty of larceny; and the conviction was sustained on case reserved, by nine judges against two. *Regina* v. *Privett* (1846), 1 Den. C. C. 193, 2 C. & K. 114, 2 Cox Cr. Cas. 40, 1 BENNETT & HERD, AM. L. CRIM. CAS. 440, CHAPLIN, CRIM. CAS. 349, MIKELL, CRIM. CAS. 814, ROOD, DIGEST 477. See also, *Regina* v. *Morfit* (1816), Russell & R. 307, 1 BENNETT & HERD, AM. L. CRIM. CAS. 438, BEALE, CRIM. CAS. 683, CHAPLIN, CRIM. CAS. 345. A postmaster who used the funds of the government to pay the expenses of the office in excess of those allowed by the department was held guilty of embezzlement. *U. S.* v. *Adams* (1881), 2 Dak. 305, 9 N. W. 718. A bank president authorized to loan the funds of the bank was convicted of embezzlement in permitting a firm of which he was a member to over-draw its account, intending to favor the borrower, and not with intent to promote the interests of the bank, *U. S.* v. *Fish* (U. S. C. C. for S. D. New York, 1885), 24 Fed. Rep. 585. Yet the distinction taken between unauthorized appropriation of the corporate funds which would render the corporate officer or trustee civilly liable to the stockholders, corporation, or beneficiaries, and a wicked misappropriation which would render him liable to criminal punishment, is clear on principle and authority. A president of a banking company who wrongfully used the funds of the bank to buy the corporation's own stock for its use, was held not liable for criminal misappropriation of the corporate funds; for such a ruling, carried to its logical conclusion, would render every corporate officer handling funds of the company liable criminally for every breach of the by-laws of the company. *U. S.* v. *Britton* (1883), 107 U. S. 668, 2 S. Ct. Rep. 512. A president of a bank who was insolvent was held not liable criminally for asking and accepting a loan from the bank on a note backed by an insolvent indorser, the application and note being submitted to the board of directors and the loan approved and ordered by them with full knowledge of the facts, there being no intention on the part of the president or directors thus to defraud the bank, though the loan may not have been wisely ordered, and was known to be without sufficient security. *U. S.* v. *Britton* (1883), 108 U. S. 193, 2 S. Ct. Rep. 526. Even the ordering and disbursement of a dividend when there were, to the knowledge of the directors, not sufficient profits on hand to justify it, was held not sufficient to sustain a conviction of criminal misappropriation of the funds of the corporation. *U. S.* v. *Britton* (1883), 108 U. S. 199, 2 S. Ct. Rep. 531.

In view of these decisions it is interesting to speculate on, and worth while to inquire, how far Mr. E. H. Harriman and his associates in exploiting the property of the Chicago & Alton Ry. Co., and other such "financiers" by similar acts, may have rendered themselves criminally liable for misappropriation of the corporate funds in their care. J. R. R.

THE VALIDITY OF THE INITIATIVE AND REFERENDUM.—Much has been written and said upon the subject of the "Initiative and Referendum." The most of the discussion, however, has been from the political viewpoint, as to the advisability of its adoption, very little upon its legal aspect. The very recent

case of *In re Pfahler*, 88 Pac. 270, decided by the Supreme Court of California in October, 1906, and reported for the first time in February, 1907, is, therefore, of peculiar interest. The case grew out of the following facts: The city of Los Angeles is a public corporation operating under a freeholder's charter, framed and adopted under the provision of Sec. 8, Art. II of the California Constitution, and approved by the legislature of that state in 1889. In 1903, the citizens of Los Angeles adopted as an amendment to their charter a provision by which ordinances could be enacted by the people directly at the polls without any action on the part of any representative legislative body, and by which proposed measures could be referred by the council to the people for adoption or rejection, in other words and in short, what is popularly known as the initiative and referendum system of legislation. This amendment was approved by the legislature the same year. By virtue of this provision certain ordinances were enacted by the people directly at the polls; and for the violation of one of these the petitioner, Pfahler, was arrested and imprisoned. He thereupon sued out a writ of habeas corpus, basing his application for the writ on the ground that the ordinance had not been legally enacted, consequently his detention was unlawful, and that its enactment had been illegal in that the amendment to the city's charter, pursuant to which the ordinance was adopted, was void as being in contravention of certain provisions of the state constitution and also Sec. 4, Art. 4 of the Constitution of the United States, which guarantees to every state in the Union a republican form of government. The court held, McFARLAND, J., dissenting, that upon the latter ground, and that is the only one with which this note is concerned, the petitioner's position could not be sustained and the writ was dismissed.

Just what is the meaning and scope of that guaranty in the Federal Constitution is difficult to determine, as courts of last resort have been called upon but rarely to pass upon it and when they have, no attempt has been made to define with any definiteness its limits. In a prior number of this Review, 5 MICH. LAW REV. 183, in a note commenting upon *People* v. *Johnson* (Colo), 86 Pac. 233, there was an attempt to set forth the views of a number of eminent writers as to the scope of that clause, but that case arose out of facts not at all similar to those in the Pfahler case.

The court bases its conclusion largely on the ground that in their opinion the constitutional provision was meant to refer merely to the form of the state government, leaving the power of the state to provide for purely local government absolutely untrameled, and cites in support of their theory the familiar instance of the New England town where the initiative and referendum exist in probably the purest form. These New England towns were in existence at the time of the framing of the Constitution, so must not have been considered as within its operation, for all writers seem to agree that in the minds of the framers of the Constitution the governments then in existence in the various states were republican in form. This line of argument is almost convincing, but still there seems a logical difficulty in adopting in its entirety the conclusion reached; and it is the purpose of this note to briefly outline some of the difficulties involved.

A public corporation is a creature of the state brought into existence for the purpose of the more effectual administration of the state's governmental functions, and in so far at least as that public corporation exercises governmental functions, it is the agent of the state having such power as the state has given it either expressly or impliedly. It is fundamental that power cannot be given to an agent to do anything which the conferrer of the power could not do in the first instance. So when the Supreme Court of California held that the state had given power to the public corporation, Los Angeles, to enact legislation, in its proper sphere of course, they also by necessary implication held that it was within the power of that state by proper constitutional additions or changes to give the people of the state of California the power to legislate by their direct act and without the necessity of the intervention of a representative legislative body, thus practically abrogating all necessity of any such representative body. This, of course, could be done unless there is some provision of the Federal Constitution that prohibits it.

It might be suggested that the fallacy of this line of reasoning lies in the fact that the power given to the city of Los Angeles was the power to legislate and that the initiative and referendum were only *methods* of exercising that power. Granting for the moment that it is necessary for a state to legislate through a *representative* body, if that state can empower its public corporations to pass laws by a system other than the representative, the state can do in an indirect manner that which it cannot do directly, for there is no limit to the authority that by proper constitutional changes the state can confer on its public corporations as long as the Federal Constitution is not contravened; thus practically all the legislation of that state could be enacted without the intervention of any representative body, so that objection seems hardly tenable.

This brings us to the question, does a state in which the legislative power is in the people and laws are enacted by the people directly without the act of any representative legislative body have a republican form of government within the meaning of Sec. 4, Art. 4 of the United States Constitution? A republic in Webster's Dictionary is defined to be, "A state in which the sovereign power resides in the whole body of the people, and is exercised by representatives elected by them." "By the Constitution a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of legislative power in representative bodies, whose legitimate acts may be said to be those of the people themselves." CH. J. FULLER in *Re Duncan*, 139, U. S., 449, 461. This is adopted by Miller on Constitutional Law as the meaning of the provision. In CURTIS, HISTORY OF THE UNITED STATES CONSTITUTION, Chap. 16, the author puts this question: "Is it competent to a state to abolish altogether that body of its fundamental law we call its constitution and to proceed as a mere democracy, enacting, expounding, and executing laws by the direct action of the people and without the intervention of any representative system constituting what is known as government?" and answers

it as follows: "It may be said, therefore, with strictness, that in the American system a republican government is one based on the right of the people to govern themselves, but requiring that right to be exercised through public organs of a representative character; and the organs constitute the government." "By republican government is understood a government by representatives chosen by the people; and it contrasts on one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and on the other with the rule of one ruler, as king, emperor, czar, or sultan, or with that of one class of men, as an aristocracy." COOLEY, CONSTITUTIONAL LIMITATIONS, 213. Apparently a strictly literal construction of Sec. 4, Art. 4, and an interpretation of the words there used in their commonly accepted and true meaning cannot help but lead to the conclusion that in a republican form of government legislation must be by and through a representative body chosen by the people. But was it the purpose of the framers of the Constitution that such a literal interpretation should be followed?

In *Kadderly* v. *Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222, the validity of a constitutional amendment which provided that the legislative power should be vested in the legislature, but reserved to the people the power to enact or reject at the polls any law except certain classes of legislation, in effect the initiative and referendum, was discussed. The court by Mr. JUSTICE BEAN said: "Nor do we think the amendment void because in conflict with the Constitution of the United States, Art. 4, Sec. 4, guaranteeing to every state a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several states against autocratic and monarchical invasions, and against insurrection and domestic violence, and to prevent them from abolishing a republican form of government: COOLEY, CONST. LIM. (7 ed.) 45; 2 STORY, CONSTITUTION, (5 ed.) § 1815. But it does not forbid them from amending or changing their Constitution in any way they may see fit so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is one administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a given period or during good behavior;'" The Federalist, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: "But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the Federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican consti-

tutions; The Federalist, 342. Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of government, or substituted another in its place. The government is still divided into legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people." Apparently the court considered it essential to a republican form of government that the functions of the three governmental departments be carried on by representatives of the people, but that in the case then before them this feature was preserved since the legislature had not been abolished. Following out this doctrine, there would be a republican form of government so long as any representative legislative body remained, even though that body could enact laws upon but one subject, all the rest of the legislative power having been reserved to the people.

Probably it may be said, therefore, that the true basis of these decisions lies in the giving of a liberal interpretation to Art. 4, Sec. 4. There have been instances in the history of the constitutional law of the United States when the express terms of the Constitution have had to give way to the demands of public necessity. These may be instances when a literal construction of its terms must give way that the demands of public opinion be met.

R. W. A.

SCOPE OF REVIEW, ON APPEAL FROM DECISION OF STATE BOARD OF HEALTH, REVOKING CERTIFICATE TO PRACTICE MEDICINE.—Sec. 5 of ch. 165 of the General Laws of Rhode Island provides that "The State Board of Health may refuse to issue the certificate provided for in Section three of this chapter, to any individual guilty of grossly unprofessional conduct of a character likely to deceive or defraud the public, and it may after due notice and hearing revoke such certificate for like cause." Provision is made in the same section for appeal from the decision of the board to the Supreme Court. The defendant was cited before the State Board under the clause of this statute relative to revocation of certificates, was found guilty and his certificate revoked. Appeal was taken under the statute to the Supreme Court. The evidence upon which the board acted, consisted mainly of advertisements circulated by the defendant of which the following is a fair extract, "The Electricure—absolutely cures Consumption, Female Complaints, Paralysis, Rheumatism, Heart Disease, and all acute Chronic and Organic diseases, no matter what their name or origin—. It is no faith cure or necromancy, but is the practical application of the greatest discovery —the giving of oxygen—of this wise age for the cure of all human ills, and all ailments of beasts as well, for the principle affects equally all living kind." *Held,* that the decision of the State Board of Health was founded upon insufficient evidence and must be reversed, since the court could not take judicial notice "that the statements therein contained are